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5 **UNITED STATES DISTRICT COURT**  
6 **DISTRICT OF NEVADA**

7 GERARDO CASTILLO,

8 *Petitioner,*

9 vs.

10 LEGRAND, *et al.,*

11 *Respondents.*  
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3:13-cv-00704-LRH-VPC

ORDER

14 This habeas matter under 28 U.S.C. § 2254 comes before the Court on petitioner's motions (##  
15 9 & 11) for appointment of counsel and motion (#12) for an enlargement of time.

16 Turning first to the counsel motion, the Sixth Amendment right to counsel does not apply in  
17 habeas corpus actions. *See Knaubert v. Goldsmith*, 791 F.2d 722, 728 (9th Cir. 1986). However, 18  
18 U.S.C. § 3006A(a)(2)(B) authorizes a district court to appoint counsel to represent a financially eligible  
19 habeas petitioner whenever "the court determines that the interests of justice so require." The decision  
20 to appoint counsel lies within the discretion of the court; and, absent an order for an evidentiary hearing,  
21 appointment is mandatory only when the circumstances of a particular case indicate that appointed  
22 counsel is necessary to prevent a due process violation. *See, e.g., Chaney v. Lewis*, 801 F.2d 1191, 1196  
23 (9th Cir.1986); *Eskridge v. Rhay*, 345 F.2d 778, 782 (9th Cir.1965).

24 The Court does not find that the interests of justice require the appointment of counsel in this  
25 action.

26 The Court directed petitioner to show cause in writing why the petition should not be dismissed  
27 without prejudice because the petition is completely exhausted. The show-cause order outlined the  
28 relevant procedural history, stated the governing law, applied that law to the claims and procedural

1 history in this case, and directed the Clerk to provide petitioner copies of the briefing and order of  
2 affirmance from petitioner's state post-conviction appeal, over and above the other state court related  
3 materials attached with his petition. The Court expressly found that the interests of justice did not  
4 require the appointment of counsel during the show-cause inquiry. #7, at 4 n.3.

5 Petitioner maintains that the issue of application of AEDPA procedural bars is unduly complex,  
6 that all of the alleged defects in exhaustion were created by direct appeal and state post-conviction  
7 counsel, and that he is at a loss as to the standards to apply, citing to procedural default cases.

8 The show-cause order is directed to lack of exhaustion, not procedural default. The order, again,  
9 clearly outlines the law applicable to that issue.

10 A petitioner potentially can establish that a claim is constructively exhausted because it is  
11 procedurally defaulted. To date, however, the state courts have not applied any procedural bars to any  
12 of petitioner's claims in the federal petition, given that petitioner has not fairly presented any of the  
13 claims to the state courts through to the state supreme court. Significantly, the Nevada state courts  
14 apply substantially the same standards as do the federal courts in determining whether a petitioner can  
15 overcome a possible procedural default of a claim.<sup>1</sup> The Court therefore will not find a claim  
16 constructively exhausted based upon the claim being procedurally defaulted unless the petitioner  
17 unequivocally stipulates that the unexhausted claims in fact would be denied on state procedural  
18 grounds if he returned to state court to present the claims. Such an unequivocal stipulation, to in truth  
19 be unequivocal in light of the procedural default rules under Nevada law, must include concessions that:  
20 (1) petitioner cannot avoid dismissal of the claims in the state courts because he cannot demonstrate  
21 cause and prejudice in the state courts to overcome the state procedural bars; (2) petitioner cannot avoid  
22 dismissal of the claims in the state courts because he cannot demonstrate in the state courts that the

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24 <sup>1</sup>Under state practice, "[a] petitioner can overcome the bar to an untimely or successive petition by showing  
25 good cause and prejudice." *E.g., Mitchell v. State*, 149 P.3d 33, 36 (Nev. 2006). In *Robinson v. Ignacio*, 360 F.3d 1044  
26 (9th Cir. 2004), the court of appeals recognized that "Nevada's 'cause and prejudice' analysis and the federal 'cause and  
27 prejudice analysis' are nearly identical, as both require 'cause for the default and actual prejudice as a result.'" 360 F.3d  
28 at 1052 n.3. Moreover, the Nevada state courts also recognize the same exception for a fundamental miscarriage of  
justice, such that "[e]ven when a petitioner cannot show good cause sufficient to overcome the bars to an untimely or  
successive petition, habeas relief may still be granted if the petitioner can demonstrate that 'a constitutional violation has  
probably resulted in the conviction of one who is actually innocent.'" *Mitchell*, 149 P.3d at 36 (quoting *Murray v.*  
*Carrier*, 477 U.S. 478, 496 (1986)).

1 alleged constitutional violation probably has resulted in the conviction of one who is actually innocent  
2 and cannot thereby overcome these procedural bars; and (3) the procedural bars otherwise are now  
3 consistently applied by the Nevada state courts, such that it is not possible that the state courts, as a  
4 discretionary matter, would consider the claims despite the procedural default and despite a failure to  
5 demonstrate either cause and prejudice or actual innocence. Absent such unequivocal concessions, the  
6 Court will not hold that there is no possibility that the unexhausted claims would be considered by the  
7 state courts on the merits.

8 In short, if petitioner wishes to rely on procedural default case law to overcome the lack of  
9 exhaustion of his claims, he must unequivocally stipulate that he cannot overcome any applicable state  
10 procedural bars in the state courts. If he does not so stipulate, the Court will dismiss the petition  
11 without prejudice for complete lack of exhaustion. If he does so stipulate, then the Court instead will  
12 dismiss the petition with prejudice on the basis of procedural default.

13 Given that the Nevada courts apply substantially the same standards to overcome a procedural  
14 default as in federal court, there is no “middle area” where a petitioner can rely upon a possible  
15 procedural default to demonstrate the constructive exhaustion of his claims and then present a cause-  
16 and-prejudice or other argument for the first time in federal court to overcome the procedural bar.  
17 Rather, petitioner must present any such cause-and-prejudice or other argument to the state courts in  
18 the first instance if he seeks to overcome a possible procedural default of his claims.<sup>2</sup>

19 At present in this action, petitioner must respond to the show-cause order and demonstrate why  
20 the action should not be dismissed without prejudice for a complete lack of exhaustion. Following the  
21 further review herein, the Court does not find that the interests of justice require the appointment of  
22 counsel in this action, whether during the show-cause inquiry or otherwise. The fact that petitioner was  
23 sentenced in his twenties to consecutive life sentences with the possibility of parole does not require  
24 the appointment of counsel standing alone.

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27 <sup>2</sup>Nothing in the Court’s orders herein make any implied suggestion as to the running of the state and federal  
28 limitation periods. Petitioner at all times remains responsible for independently calculating the running of all applicable  
limitation periods and properly and timely asserting claims. The Court’s orders herein make no implied representation  
as to the running of any limitation period and do not toll the running of any state or federal limitation period.

1 The motions for appointment of counsel therefore will be denied. The Court will grant the  
2 extension motion in part to the extent that petitioner shall have thirty days from entry of this order  
3 within which to respond to the show-cause order.

4 IT THEREFORE IS ORDERED that petitioner's motion (#12) for an extension of time is  
5 GRANTED IN PART, to the extent that petitioner shall have thirty (30) days from entry of this order  
6 within which to mail a response to the show-cause order to the Clerk for filing. The matter will be  
7 dismissed without further advance notice if petitioner fails to timely respond and show cause why the  
8 action should not be dismissed.

9 IT FURTHER IS ORDERED that petitioner's motions (## 9 & 11) for appointment of counsel  
10 are DENIED.

11 DATED this 11th day of June, 2014.

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15 LARRY R. HICKS  
16 UNITED STATES DISTRICT JUDGE  
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